STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
The Honorable Patrick M. Meter, the Honorable William C. Whitbeck, and the Honorable Bill Schuette

BUDDY MILLER,

Plaintiff-Appellant,

-vs-

CHAPMAN CONTRACTING, SWEEPMASTER, INC., RAMZY KIZY, JR. and KEVIN PAPERD,

Defendants-Appellees.
_____/

Supreme Court No. _____

Court of Appeals No. 256676

Lower Court No. 03 053572 NI

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_____/

130808

NOTICE OF APPEARANCE

APPEARANCE

ANSWER TO APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

Dated: April 5, 2006

STATE OF MICHIGAN

IN THE SUPREME COURT

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_____/

NOTICE OF APPEARANCE

TO: JASON J. LISS
Attorney for Plaintiff-Appellant

PLEASE TAKE NOTICE that the undersigned has as of this date entered his Appearance as attorney for the Defendants-Appellees, CHAPMAN CONTRACTING, SWEEPMASTER, INC., RAMZY KIZY, JR. and KEVIN PAPERD, in the within cause.

SECREST WARDLE

BY: _____
MICHAEL L. UPDIKE (P 28964)
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Dated: April 5, 2006

APPEARANCE

TO: Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa
Lansing, MI 48915

Please enter the Appearance of the undersigned as attorney for the Defendants-Appellees, CHAPMAN CONTRACTING, SWEEPMASTER, INC., RAMZY KIZY, JR. and KEVIN PAPERD, in the within cause.

SECREST WARDLE

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ANSWER OF DEFENDANTS-APPELLEES TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

Dated: April 5, 2006

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COMMENT ON PLAINTIFF-APPELLANT'S STATEMENT OF JURISDICTION

The Defendants-Appellees Chapman Contracting, Sweepmaster, Inc., Ramzy Kizy, Jr. and Kevin Paperd (hereinafter collectively referred to as the Defendants) accept the Statement of Jurisdiction in Plaintiff-Appellant Buddy Miller's (Plaintiff) March 27, 2006 Application for Leave to Appeal as being a fair and accurate statement of the jurisdiction of the Supreme Court over the above-entitled cause of action at this time.

COUNTER-STATEMENT OF THE QUESTION PRESENTED

The Plaintiff was injured in an automobile accident with the Defendant. The Plaintiff subsequently filed for personal bankruptcy. Later, the Plaintiff sued the Defendant for the injuries the Plaintiff allegedly suffered in the accident. The Court of Appeals affirmed the trial court's finding that the Plaintiff had no standing to sue because the Plaintiff's rights with respect to the accident had been transferred to the trustee in bankruptcy following the Plaintiff's filing for bankruptcy. Should the Supreme Court grant leave and review the decision of the Court of Appeals to affirm the trial court?

Plaintiff would presumably contend the answer to the question is **"Yes."**

The Defendants respectfully suggest the answer to the question should be **"No."**

The trial court, the Honorable Fred M. Mester (Judge Mester) of the Oakland County Circuit Court, was not asked the question and it is not known how he would answer it.

The Court of Appeals, the Honorable Patrick M. Meter (Judge Meter), the Honorable William C. Whitbeck (Chief Judge Whitbeck) and the Honorable Bill Schuette (Judge Schuette), was not asked the question and it is not known how the Court of Appeals would answer it.

COUNTER-STATEMENT OF FACTS

The Defendants must regretfully **reject** the Concise Statement of Proceedings and Facts in Plaintiff's Application for Leave to Appeal because the Concise Statement does not comply with MCR 7.212(C)(6). That is, Plaintiff's Concise Statement does **not** fairly state all material facts, favorable and unfavorable to Plaintiff, without argument or bias. Accordingly, the Defendants have had no choice but to prepare the instant **Counter-Statement of Facts** so the Supreme Court will have an accurate picture of both the proceedings below and the issues involved in the matter at bar.

Plaintiff was allegedly injured in a motor vehicle accident with Defendant-Appellee Kevin Paperd (Mr. Paperd) in Oakland County, Michigan on December 28, 2000. (Plaintiff's Complaint, ¶¶ 9 and 10, Exhibit A in the Appendix to this Answer). Defendant-Appellees Ramzy Kizy, Jr. (Mr. Kizy), Sweepmaster, Inc. (Sweepmaster) and/or Chapman Contracting, Inc. (Chapman) allegedly owned the vehicle Mr. Paperd was driving at the time of the accident. (Plaintiff's Complaint, ¶ 9)

On March 6, 2002, Plaintiff filed a Voluntary Petition for personal bankruptcy in the United States Bankruptcy Court for the Eastern District of Michigan. (Plaintiff's Voluntary Petition, Exhibit B in the Appendix) While the Voluntary Petition, being a written document, ultimately speaks for itself, it may be fairly summarized as not listing any exemption for whatever cause of action Plaintiff may have had as a result of the December 28, 2000 accident.

Plaintiff filed the instant lawsuit against the Defendants in the Oakland County Circuit Court on October 22, 2003, where it was assigned to Judge Mester. (Exhibit A, Page 1) It should be noted that Plaintiff was the Plaintiff in the case. That is, Plaintiff brought the suit in

his own name, *not* in the name of the Trustee in Bankruptcy for Plaintiff despite Plaintiff's previously mentioned personal bankruptcy.

The Defendants duly answered Plaintiffs' Complaint, specifically raising Plaintiff's bankruptcy and his lack of standing to bring suit against the Defendants for the December 28, 2000 accident as an affirmative defense. (The Defendants' December 16, 2003 Special and/or Affirmative Defenses, ¶¶ 11, 12 and 13, Exhibit C in the Appendix.)

The Defendants filed a Motion for Summary Disposition based on MCR 2.116(C)(5), lack of standing to bring suit, with the court below on or about April 20, 2004. Plaintiff opposed the motion, and Judge Mester entertained oral argument on the matter on June 2, 2004.

A copy of the transcript of the June 2, 2004 proceedings is including in the Appendix to this Answer, tabbed Exhibit D. The key portion of Judge Mester's discussion of the case is presented below for the convenience of the Court of Appeals.

> The facts are essentially that October 22nd, 2003, Plaintiff filed this Complaint seeking damages for personal injuries resulting from a motor vehicle accident on December 28th, 2000. Plaintiff files a Petition for Bankruptcy under chapter seven on March 6th, 2002. And Plaintiff filed an amended schedule chapter B and chapter C on May 16th, 2003. The bankruptcy court discharged Plaintiff's estate on June 6th, 2002.
>
> Defendant's Motion for Summary Disposition asserts that the amended bankruptcy schedule B and C claimed an exemption for his interest in a potential lawsuit in the amount of 27,075 dollars. Defendant argues that the bankruptcy estate, not the Plaintiff, the debtor, is the real party in interest, referring the Court to Cottrell vs. Schilling [Cottrell v Schilling, 876 F2d 540 (CA 6, 1989)].
>
> Defendant has reviewed the legislative history of 11 USC § 541 and asserts that Congress intended that personal injury actions were to be included as property of the bankruptcy estate. Thus, Defendant argues that all of Plaintiff's rights, title and interest with regard to the December 28th, 2000 accident were transferred to the bankruptcy trustee to the benefit of the bankruptcy estate on the filing of the petition.

Next, Defendant argues that plaintiff's interest is limited to his claimed exemption of 27,075 dollars.

Now the Plaintiff has responded by asserting that the Complaint was filed in his name and not that of the trustee, was due not to the neglect of—was due to the neglect of Plaintiff's counsel and not to Plaintiff or the trustee.

Plaintiff argues that the fact that the named Plaintiff will change is not fatal to the application of the Relation Back Doctrine and they've referred me to the Estate of Shirley Miller vs. Trizec [Estate of Shirley J. Miller v Trizec Properties, 965 F2d 113 (CA 6, 1992)]. Excuse me.

And Plaintiff asks this Court to permit an amendment of the pleadings to substitute the trustee in place of the Plaintiff and relate back to the amendment to the original date of the filing of the Complaint.

Now Defendant has replied by noting that Plaintiff does not dispute that the claim should have been filed by the bankruptcy trustee, not Plaintiff, and, thus, they should be dismissed and they've cited Huffman v Shafer [Dennis H. Huffman v Stuart R. Shafer and Reid & Reid, Michigan Court of Appeals No. 223612, *rel'd* 8/21/01 (unpublished), Exhibit G in the Appendix to this Answer], an unpublished opinion, in which the Court denied the Motion to Amend to Substitute the Trustee for Plaintiff, after the Statute of Limitation had run, as here.

And Plaintiff's motion on their argument to amend, argues that he should be permitted to amend the Complaint to substitute the trustee for Plaintiff, noting that the error in drafting was Plaintiff's counsel, not Plaintiff or the trustee.

And Defendants have responded by arguing that Plaintiff's Motion for—to Amend should be denied because it reflects the addition of a new party after the Statute of Limitations expired and the amendment, therefore, would be futile. It also notes that the Relation Back Doctrine does not extend to new parties referring me to Employers Mutual v Petroleum [Employers Mutual Insurance Company v Petroleum Equipment Company, 190 Mich App 577; 475 NW2d 418 (1991)].

Transcript of the June 2, 2004 proceedings before Judge Mester, Pages 3-5, Exhibit D in the Appendix.

During the course of the June 2, 2004 proceedings, Plaintiff requested and received permission to supplement his Brief with additional authority that suggested Employers Mutual Insurance Company v Petroleum Equipment Company did not serve as a bar to substituting the

Trustee in Bankruptcy for Plaintiff in the case. Transcript of the June 2, 2004 proceedings before Judge Mester, Pages 9-10.

Plaintiff and the Defendants submitted supplemental briefs to Judge Mester. On June 23, 2004, Judge Mester issued an Opinion and Order (please see Exhibit E in the Appendix to this Answer) that granted the Defendants' Motion for Summary Disposition. The text of Judge Mester's Opinion and Order is presented below for the convenience of the Court of Appeals.

> This matter comes before the court on Defendant's Motion for Summary Disposition pursuant to MCR 2.116(C)(5) lack of standing and Plaintiff's Motion to Amend the Complaint to substitute Wendy Turner as trustee for the bankruptcy estate of Buddy Miller as Plaintiff. The court heard oral argument on June 2, 2004 and took the matter under advisement.
>
> On October 22, 2003, Plaintiff filed his Complaint seeking damages for personal injuries resulting from a motor vehicle accident on December 28, 2000. Plaintiff filed a Petition for Bankruptcy (Chapter 7) on March 6, 2002. Plaintiff filed an Amended Schedule V and C on May 16, 2002. The Bankruptcy Court discharged Plaintiff's estate on June 6, 2002.
>
> With regard to the Motion for Summary Disposition, Defendant asserts that the Amended Bankruptcy Schedule B and C claimed an exemption for his interest in a potential lawsuit in the amount of $27,075.00.
>
> Defendant argues that the bankruptcy estate, not Plaintiff, the debtor, is the real party in interest. Cottrell v Schilling, 876 F2d 540 (CA 6, 1989). Defendants review the legislative history of 11 USC § 541 and asserts that Congress intended that personal injury actions were to be included as property of the bankruptcy estate. Thus, Defendant argues that all of Plaintiff's rights, title and interest with regard to the December 28, 2000 accident were transferred to the bankruptcy trustee for the benefit of the bankruptcy estate on the filing of the petition.
>
> Next, Defendant argues that Plaintiff's interest is limited to his claimed exemption of $27,075.090. *In re* Bregni, 215 BR 850 (WD Mich, 1997).
>
> Plaintiff responds that the Complaint was filed in his name and not that of the trustee was due to the neglect of Plaintiff's counsel and not to Plaintiff or the trustee. Plaintiff argues that the fact that the named Plaintiff will change is not fatal to the application of the relation back doctrine. Estate of Shirley Miller v Trizec, 965 F2d 113 (CA 6, 1992). Plaintiff asks the court to permit an

amendment of the pleading to substitute the trustee in place of Plaintiff and that it relate back to the amendment of the original date of the filing of the Complaint.

Defendant notes that Plaintiff does not dispute that the claims should have been filed by the bankruptcy trustee, not Plaintiff, and thus, they should be dismissed. Defendant cites an unpublished opinion [Foster l. Whitfield v Ford Motor Company, Civil Action No. 94-CV-70563-DT, U.S. District Court for the Eastern District of Michigan, *rel'd* 2/27/95 (unpublished), 1995 U.S. Dist. LEXIS 5633, Exhibit F in the Appendix to this Answer] in which the court denied the Motion to Amend to substitute the trustee for Plaintiff after the statute of limitations had run, as here.

On June 2, 2004, the court permitted the parties to file additional briefs which argue as follows. Plaintiff distinguishes the case on which Defendant relies, Employers Mutual v Petroleum, 190 Mich App 57; 475 NW2d 418 (1991). Plaintiff notes that in that case, Plaintiff sought to bring in an entirely new defendant after the state of limitations had run where here, Defendants were brought into the present case before the statute of limitations ran and Plaintiff merely seeks to correct the name. Further, Plaintiff notes that the issue here is whether the court has the authority to correct a misnomer and that there are exceptions to this rule, especially when a misnomer is involved, as here. Plaintiff cites several cases in which the courts held that the court can correct a misnomer which does not affect the substantial rights of the parties.

In its supplemental brief, Defendant argues that it understood that the court was permitting Plaintiff to submit cases issued after Employers Mutual. However, Defendant notes that the rule in Employers is applicable to this day. Defendant notes that although Plaintiff is arguing that it is not attempting to add a new party, this case is almost identical to Huffman v Shaffer, unpublished opinion *per curiam* of the Court of Appeals decided August 21, 2001 (docket no. 223612) [Exhibit G in the Appendix to this Answer], in which the court held that Plaintiff could not add the bankruptcy trustee as the Plaintiff after the statute of limitations ran.

As to the Motion to Amend, Plaintiff argues that he should be permitted to amend the Complaint to substitute the trustee for Plaintiff, noting that the error in drafting was due to Plaintiff's counsel, not Plaintiff or the trustee.

Defendant responds that the Motion to Amend should be denied because it requests the addition of a new party after the statute of limitations expired and the amendment would be futile. Defendant also notes that the relation back doctrine does not extent to new parties. Employers Mutual, *supra*.

Having reviewed the arguments of the parties in light of the relevant Michigan law, the court finds as follows. There is no dispute the real party in interest is the

bankruptcy trustee, not Plaintiff. Thus, the issue is whether Plaintiff should be granted leave to amend to add the bankruptcy trustee.

Under MCR 2.118(A)(2), leave to amend pleadings should be freely given when justice so requires. Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile. Ben Fyke & Sons v Gunter, 390 Mich 649; 213 NW2d 134 (1973). In Employers Mutual at page 63, the court held that "Although an amendment generally relates back to the date of the original filing if the new claim asserted arises out of the conduct, transaction, or occurrence set forth in the original pleading, MCR 2.118(D), the relation-back doctrine does not extend to the addition of new parties."

The court is satisfied that because the bankruptcy trustee was the real party in interest prior to the filing of the Complaint, this is a motion to add a party and is not merely a request to correct a misnomer. Thus, the court finds that based on the binding precedent in Employers, the amendment would be futile as the addition of the new party cannot relate back to the original Complaint.

For the reasons stated, Defendants' Motion for Summary Disposition is granted and Plaintiff's Motion to Amend is denied.

It is so ordered.

Judge Mester's June 23, 2004 Opinion and Order was the final order in the case, in that it resolved all of the rights of all of the parties and closed the case insofar as the Oakland County Circuit Court was concerned.

Plaintiff timely appealed Judge Mester's Opinion and Order to the Court of Appeals. On February 16, 2006, the Court of Appeals, Judge Meter, Chief Judge Whitbeck and Judge Schuette, issued a *per curiam* unpublished decision and opinion which affirmed Judge Mester. The complete text of the decision and opinion of the Court of Appeals is presented below for the convenience of the Supreme Court, and a copy of the slip decision may be found tabbed as Exhibit H in the Appendix to this Answer.

PER CURIAM.

Plaintiff appeals as of right from the trial court order denying his motion to amend his complaint and granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(5) based on lack of standing. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's complaint alleged that on December 28, 2000, defendant Kevin Paperd was operating an automobile that was owned by one or more of the remaining defendants when he negligently struck plaintiff's vehicle, causing plaintiff to suffer a serious impairment of an important body function and/or serious permanent disfigurement. Defendants sought summary disposition pursuant to MCR 2.116(C)(5), contending that plaintiff was not the real party in interest and lacked standing to sue. Defendants alleged that plaintiff had filed a petition for bankruptcy under Chapter 7 of the United States Bankruptcy Code on March 6, 2002, and that all of plaintiff's rights regarding the December 28, 2000, accident were therefore transferred to the bankruptcy trustee, who was the sole party who could pursue the lawsuit.

In response, plaintiff filed a motion for leave to file an amended complaint in order to correct the "misidentification" of the named plaintiff. Plaintiff stated that Wendy Turner Lewis, the trustee for his bankruptcy estate, had authorized plaintiff's counsel to file a complaint on behalf of the bankruptcy estate, and that counsel, through no fault of plaintiff or Lewis, had misidentified the plaintiff.

The trial court entered an order denying as futile plaintiff's motion to amend and granting defendants' motion for summary disposition, stating:

> "There is no dispute the real party in interest is the bankruptcy trustee, not Plaintiff. Thus, the issue is whether Plaintiff should be granted leave to amend to add the bankruptcy trustee.
>
> Under MCR 2.118(A)(2), leave to amend pleadings should be freely given when justice so requires. Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile. Ben Fyke & Sons v Gunter, 390 Mich 649; 213 NW2d 134 (1973). In [Employers Mutual Casualty Company v Petroleum Equipment, Inc., 190 Mich App 57, 63; 475 NW2d 418 (1991)], the court held that 'Although an amendment generally relates back to the date of the original filing if the new claim asserted arises out of the conduct, transaction, or occurrence set forth in the original pleading, MCR 2.118(D), the relation-back doctrine does not extend to the addition of new parties.'

> The court is satisfied that because the bankruptcy trustee was the real party in interest prior to the filing of the Complaint, this is a motion to add a party and is not merely a request to correct a misnomer. Thus, the court finds that based on the binding precedent in Employers, the amendment would be futile as the addition of the new party cannot relate back to the original Complaint."

MCR 2.201(B) provides that, generally, "an action must be prosecuted in the name of the real party in interest...." "A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another." Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hospital, 221 Mich App 301, 311; 561 NW2d 488 (1997). "This standing doctrine recognizes that litigation should be begun only by a party having an interest that will assure sincere and vigorous advocacy." Kalamazoo v Richland Township, 221 Mich App 531, 534; 562 NW2d 237 (1997). It is undisputed that the bankruptcy trustee is the real party in interest and that she should have been named as the plaintiff. n1

n1 See 11 USC 541; 11 USC 323; Cottrell v Schilling, 876 F2d 540 (CA 6, 1989).

MCR 2.118(A)(2) provides that leave to amend a pleading "shall be freely given when justice so requires." But "leave to amend a complaint may be denied for particularized reasons, such as...where amendment would be futile." Hakari v Ski Brule, Inc, 230 Mich App 352, 355; 584 NW2d 345 (1998).

MCR 2.118(D) provides:

> "An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading."

However, "the relation-back doctrine does not apply to the addition of new parties." Cowles v Bank West, 263 Mich App 213, 229; 687 NW2d 603 (2004); see also Employers Mutual, *supra* at 63.

Plaintiff contends, nevertheless, that the requested amendment would do no more than correct a misnomer and that the Employers Mutual rule therefore does not bar the amendment and its relation back. "'As a general rule...a misnomer of a plaintiff or defendant is amendable unless the amendment is such as to effect an entire change of parties.'" Parke, Davis & Company v Grand Trunk Railway System, 207 Mich 388, 391; 174 NW 145 (1919) (citation omitted). The misnomer doctrine applies only to correct inconsequential deficiencies or technicalities in the naming of parties, for example, "'where the right corporation has been sued by the wrong name, and service has been made upon the right party, although by a wrong name....'" Wells v Detroit News, Inc, 360 Mich 634,

641; 104 NW2d 767 (1960), quoting Daly v Blair, 183 Mich 351, 353; 150 NW 134 (1914); see also Detroit Independent Sprinkler Company v Plywood Products Corporation, 311 Mich 226, 232; 18 NW2d 387 (1945) (allowing an amendment to correct the designation of the named plaintiff from "corporation" to "partnership") and Stever v Brown, 119 Mich 196; 77 NW 704 (1899) (holding that an amendment to substitute the plaintiffs' full names where their first and middle names had been reduced to initials in the original complaint would have been permissible). Where, as here, the plaintiff seeks to substitute or add a wholly new and different party to the proceedings, the misnomer doctrine is inapplicable. See Voigt Brewery Company v Pacifico, 139 Mich 284, 286; 102 NW 739 (1905); Rheaume v Vandenberg, 232 Mich App 417, 423 n 2; 591 NW2d 331 (1998).

Affirmed.

Plaintiff subsequently filed an Application for Leave to Appeal the February 16, 2006 decision and opinion of the Court of Appeals with this Supreme Court, pursuant to the provisions of MCR 7.302 *et seq.* The instant document is the Defendants' Answer in Opposition to Plaintiff's Application, and asks this forum to deny Plaintiff's Application for Leave to Appeal the February 16, 2006 decision and opinion of the Court of Appeals.

COMMENT ON PLAINTIFF-APPELLANT'S GROUNDS FOR APPEAL

Plaintiff states that his Application is based on MCR 7.302(B)(5), which is one of the six bases listed in MCR 7.302(B) *et seq*. for the granting of an application for leave to appeal by this Supreme Court. Specifically, MCR 7.302(B)(5) provides that leave may be granted where a decision of the Court of Appeals is clearly erroneous and, if not correct, will result in material injustice.

The Defendants have no quarrel *per se* with Plaintiff's citation of MCR 7.302(B)(5). The Defendants would, however, point out that both the decision of the trial court and the Court of Appeals was carefully based on numerous authorities, all of which supported both the original decision to dismiss Plaintiff's cause of action against the Defendants and to affirm that dismissal on appeal. By contrast, the limited number of authorities cited elsewhere in Plaintiff's Application have little or no application to the facts of the instant matter. Accordingly, Plaintiff is unable to show that the decisions of either the Court of Appeals or the trial court were clearly erroneous. Without such a showing, MCR 7.302(B)(5) has no application and cannot be used as a basis to obtain leave to appeal in this Supreme Court.

STANDARD OF REVIEW

This case was dismissed on the Defendants' Motion for Summary Disposition. The motion was based on MCR 2.116(C)(5), lack of legal capacity to sue. The granting or denying of such motions are reviewed on appeal *de novo*. *In re* Quintero Estate, 224 Mich App 682, 692; 569 NW2d 889 (1997); see also Horace v City of Pontiac, 456 Mich 744, 749; 575 NW2d 762 (1998). There is little question the Court of Appeals followed that standard in deciding to affirm the trial court's decision.

The standard of review for Supreme Court applications for leave to appeal is established by MCR 7.302(B) *et seq*. MCR 7.302(B) *et seq*. lists six separate criteria for granting leave. Plaintiff's Application, as explained *supra*, did identify one of the six, MCR 7.302(B)(5)—but then fails to show how the decision of either the trial court or the Court of Appeals was clearly erroneous.

It is well settled that appellate courts have no duty to provide authority for a litigant when the litigant, for whatever reason, has failed to do so. American Transmissions, Inc. v Attorney General, 216 Mich App 119, 120-121; 548 NW2d 665, 666 (1996); see also People v Hunter, 202 Mich App 23, 27; 507 NW2d 768 (1992).

ARGUMENT

The Plaintiff was injured in an automobile accident with the Defendant. The Plaintiff subsequently filed for personal bankruptcy. Later, the Plaintiff sued the Defendant for the injuries the Plaintiff allegedly suffered in the accident. The Court of Appeals affirmed the trial court's finding that the Plaintiff had no standing to sue because the Plaintiff's rights with respect to the accident had been transferred to the trustee in bankruptcy following the Plaintiff's filing for bankruptcy. The Supreme Court should deny leave and decline to review the decision of the Court of Appeals to affirm the trial court.

I. Plaintiff is *not* the real party in interest.

Michigan law is quite clear that lawsuits *must* be brought in the name of and prosecuted in the name of the real party in interest. MCR 2.201(B). A real party in interest is the one who is vested with the right of action on a given claim, even though the beneficial interest in the claim may rest with another. Hoffman v Auto Club Insurance Association, 211 Mich App 55, 95; 535 NW2d 529 (1995).

The real party in interest is a standing doctrine that insures litigation will be begun by a party that, because of its interest in the outcome, will actively and vigorously pursue the matter. Michigan National Bank v Mudgett, 178 Mich App 677, 679; 444 NW2d 534 (1989). The doctrine also protects defendants against multiple lawsuits for the same cause of action. Kearns v Michigan Iron & Coke Company, 340 Mich 577, 581; 66 NW2d 230 (1954).

It is undisputed that Plaintiff filed for personal bankruptcy *before* he filed the instant lawsuit, and that *all* of his rights with respect to this lawsuit (or, rather, the cause of action that the lawsuit is based on) were transferred to the Trustee in Bankruptcy. That means that Plaintiff could not have been, is not now, and could never be, the real party in interest.

Numerous courts have addressed this issue, and their holdings are uniform. The trustee in bankruptcy, or the bankrupt's estate, is the real party in interest, not the bankrupt himself or herself personally. Kuriakuz v Community National Bank of Pontiac, 107 Mich App 72; 308 NW2d 658 (1981); Whitfield v Ford Motor Company, *supra*; *In re* Ashley, 41 BR 67 (ED Mich, 1984); Cottrell v Schilling, 876 F2d 540 (CA6, 1989); Wischan v Adler, 77 F3d 875 (CA 5, 1996); and Miller v Shallowford Community Hospital, 767 F2d 1556 (CA 11, 1995). See also 11 USC § 541.

In Cottrell v Schilling, *supra*, the plaintiff, Mr. Cottrell, purportedly suffered personal injuries in an automobile accident on June 24, 1986. He and his wife had not commenced any legal proceedings against the driver of the other vehicle before declaring their joint Chapter 7 (that is, personal) bankruptcy on October 27, 1986. The Cottrells listed their personal injury claim as an asset of the bankruptcy estate.

The Cottrells filed a personal injury lawsuit against the party allegedly responsible for the June 24, 1986 in a state circuit court on December 22, 1986, alleging personal injuries and a loss of consortium as a result of the accident. The Cottrells justified their filing, as opposed to a filing by the trustee in bankruptcy, of the personal injury lawsuit on the basis the personal injury claim was not the property of the bankruptcy estate because it was not transferable to a third party under state law.

The United States for Court of Appeals for the Sixth Circuit reviewed the legislative history of the Bankruptcy Code and rejected the Cottrells' argument. The personal injury claim became an asset of the bankruptcy estate, and therefore solely under the control of the trustee in bankruptcy. *Id.*, at 543.

If the Cottrells' personal injury claim was solely an asset of the bankruptcy estate, and it patently was, then the Plaintiff's cause of action in the case at bar case is similarly an exclusive asset of his bankruptcy estate. Plaintiff, like the Cottrells before him, lacks standing to sue on his claim.

In Miller v Shallowford Community Hospital, *supra*, one Miller (Mr. Miller) was involved in a car accident on September 25, 1979. He filed his Chapter 7 Bankruptcy Petition on March 18, 1982, and did *not* list his first-party auto insurance action against his insurer as an asset of the estate. Mr. Miller received his discharge from bankruptcy on June 25, 1982, the Bankruptcy Court closing his case on July 27, 1982. Shortly thereafter, Mr. Miller made a first-party claim against his insurer.

The United States Court of Appeals for the Eleventh Circuit rejected Mr. Miller's argument that his first-party claim belonged to him. The Miller Court noted that the critical issue was whether Mr. Miller had a cause of action, even if not in suit, at the time he filed for bankruptcy. Since it was undisputed that Mr. Miller did, in fact, have such a cause of action at the time he filed for bankruptcy, the cause of action was the property of Mr. Miller's bankruptcy estate even though no suit based on the cause had yet been filed. Mr. Miller therefore lacked standing to sue on the claim. The Miller Court observed that "[Mr.] Miller's claim for insurance proceeds under the Georgia No-Fault Insurance Law, although asserted after the commencement of Miller's bankruptcy case and subsequent to his discharge from bankruptcy, was the property of the debtor's estate within the meaning of 11 USC § 541(a)(1)." *Id.*, at 1557.

It is apparent from a comparison of 11 USC § 541(a)(1) of the Bankruptcy Reform Act of 1978 with its analogous section of the former Bankruptcy Act, 11 USC § 110(a)(5), that it was the intent of Congress to extend the definition of a bankrupt's "property" to include *all* causes of

action, whether assignable or nonassignable, including actions for personal injuries suffered in an accident. Such causes of action were and are to be the sole and exclusive property of the bankrupt's estate, and therefore solely under the control of the trustee in bankruptcy. Cottrell v Schilling, *supra*, at 542. 11 USC § 110(a)(5) specifically excluded personal injury actions from being classified as property of a bankruptcy estate if such actions were nonassignable under state law. That section provided that the property of the bankruptcy estate included:

> [r]ights of action, which prior to the filing of the petition [the bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered. Provided that rights of action...for injuries to the bankrupt...shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process....

11 USC § 110(a)(5).

In contrast, 11 USC § 541(a), in force since the passage of the Bankruptcy Reform Act of 1978, provides:

> Property of the estate
>
> (a) This commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

The legislative history of 11 USC § 541 leaves little doubt that Congress intended for personal injury actions, whether they were in suit or not, to be included as property of the bankruptcy estate. The House of Representatives Report on the law states:

> The bill makes significant changes in what constitutes property of the estate. Current law is a complicated melange of references to State law, and does little to further the bankruptcy policy of distribution of the debtor's property to his creditor in satisfaction of his debts...The bill determines what is property of the estate by a simple reference to what interests in property the debtor has at the commencement of the case. This includes all interests, such as...tangible and intangible property...causes of action...whether or not transferable by the debtor.

Id., at 542, citing United States House of Representatives Report Number 595, 95th Congress, 2nd Session, as reprinted in 1978 *United States Code Congressional and Administrative News* 6136 (footnotes omitted).

In the case at bar, all of Plaintiff's rights, title and interest regarding the December 28, 2000 accident were transferred to the Bankruptcy Trustee for the benefit of the bankruptcy estate upon filing of Plaintiff's bankruptcy petition. See 11 USC § 541 and the cases cited *supra*. All of Plaintiff's property became the property of, and therefore under the sole control of, the bankruptcy estate's Trustee. The only party who had, has and will have[1] standing to pursue Plaintiff's personal injury claim is the Trustee in Bankruptcy, not Plaintiff. Whitfield v Ford Motor Company, *supra*. The Whitfield Court

> In this matter the court finds that Plaintiff is not the proper party to bring this lawsuit. As all property, even exempt property, is property of the bankruptcy estate, therefore the bankruptcy trustee, and not the debtor, is the sole party who may pursue these claims. The court therefore grants Defendant's motion for summary judgment and dismisses Plaintiff's claims.

Judge Mester was correct in relying on the persuasive reasoning of Whitfield as well as the language of 11 USC § 541 as a basis for granting the Defendants' Motion for Summary Disposition on the basis of MCR 2.116(C)(5). Plaintiff did not have standing, does not have

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[1] As a practical matter, the Trustee cannot pursue a claim arising out of the December 28, 2000 accident because of the running of the statute of limitations. See MCL § 600.5805(10).

standing and will never have standing to bring the instant lawsuit against the Defendants. The Court of Appeals recognized that, and was 100% correct in affirming the trial court's decision in all respects. No useful purpose would be served by having this Supreme Court expend its scarce and extremely valuable resources in reviewing decisions of a trial court and the Court of Appeals that were correct in all respects.

II. Plaintiff cannot remedy his lack of standing by claiming "misnomer"

Even a casual reading of the transcript of the June 2, 2004 hearing before Judge Mester will, at least in all probability, leave the reader with the impression that Judge Mester was prepared to grant the Defendants' Motion for Summary Disposition on the basis Plaintiff lacked standing to bring suit against the Defendant. Plaintiff therefore sought to raise a new argument—misnomer.

Although Plaintiff and Plaintiff alone filed the instant lawsuit and prosecuted it for some seven months, it was only after it became clear the case was likely to be dismissed because of Plaintiff's lack of standing that Plaintiff suddenly decided it was never his intent to bring the suit in his own name, even though that is exactly what he did. Rather, it was always, supposedly at any rate, his intent to have the Trustee in Bankruptcy pursue the claim.

What is more than a little interesting about Plaintiff's sudden conversion, for lack of a better characterization, on the standing issue is that there is no way it should have come as a surprise to Plaintiff. There is no question but that Plaintiff was put on notice of the standing issue in the Defendants' December 16, 2003 Special and Affirmative Defenses to Plaintiff's claim. This was twelve days before the statute of limitations for the December 28, 2000 accident

ran, and any claim arising from the accident became time-barred by MCL § 600.5805(10). Please see Exhibit C in the Appendix to this Answer.

Plaintiff's belated recognition of the standing issue aside, the fact remains that substituting the Trustee in Bankruptcy for Plaintiff would *not* be correcting a misnomer. It would be *substituting parties*. It is well settled that the substitution of parties in a lawsuit does not relate back to the original filing of the lawsuit. Hurt v Michael's Food Center, Inc., 220 Mich App 169, 179; 559 NW2d 660 (1996). As noted *supra*, the statute of limitations for Plaintiff's cause of action for the December 8, 2000 accident is controlled by MCL § 600.5805(10), or three years. The ability of the Trustee in Bankruptcy to sue for damages on the basis of the December 8, 2000 accident therefore terminated on December 8, 2003, or some six months *before* Plaintiff suddenly decided that he had really meant for the Trustee in Bankruptcy instead of himself to file the instant lawsuit.

The Defendants respectfully suggest this lawsuit is on the proverbial "all fours" with Dennis H. Huffman v Stuart R. Shafer and Reid & Reid, *supra*, Exhibit G in the Appendix. The Defendants acknowledge that Huffman, because it was not formally designated for publication, is not precedent *per se*. The Defendants respectfully suggest, however, that the *ratio decidendi* of Huffman is compelling, particularly in light of the factual similarities between Huffman and the case at bar. The Defendants would also refer the Supreme Court to Karen M. Poole's article, "Lawyers Cannot, Should Not Neglect Unpublished Opinions", Michigan Lawyers Weekly, 9/1/03, Vol. 17, No. 43, where Chief Judge Whitbeck was quoted as stating:

> "The reasoning in unpublished decisions can often be persuasive, particularly if a judge or judges on the [Court of Appeals hearing] panel also participated in the unpublished decision."

"The term 'unpublished opinion' is a misnomer. Given the advent of computerized research tools and services, such as those provided by [Michigan] Lawyers Weekly, no decision of the Court of Appeals is truly 'unpublished.' They can be, and often are, well-reasoned, well-written, and therefore quite persuasive even though they are not precedentially binding."

"There is a school of thought, to which I happen to subscribe, that holds that all of our opinions should be precedentially binding."

Judge Donald S. Owens of the Court of Appeals was quoted as stating:

"I consider all decisions cited to us, including unpublished opinions. The reasoning in an unpublished opinion may, on occasion, be helpful in a particular case."

Former Chief Judge *Pro Tempore* of the Court of Appeals Michael Smolenski was quoted as stating:

"I consider unpublished cases when deciding an appeal, not for their binding precedential value but to look at their analysis of a similar situation or set of facts or legal issue. Also, they are useful to make sure that we are consistent in deciding an appellate issue that has earlier been decided, but unpublished."

Just so there is no doubt about the striking applicability of Huffman to the case at bar, the complete text of the opinion is presented below for the convenience of the Supreme Court.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition and denying his motion to amend the caption of his complaint. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendants represented plaintiff in a custody action in which plaintiff did not prevail. On March 6, 1997, after the conclusion of the custody action, plaintiff filed for bankruptcy. He listed a potential cause of action for legal malpractice against defendants as an asset in the bankruptcy action. On December 3, 1997 plaintiff filed suit alleging that defendants committed legal malpractice when representing him in the custody dispute. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that plaintiff was

not entitled to bring the action because he was not the real party in interest, that plaintiff was estopped from asserting a claim for legal malpractice, and that no reasonable jury could find in plaintiff's favor. Plaintiff moved to amend the caption of the complaint to substitute or add the bankruptcy trustee as plaintiff. Plaintiff's motion was filed after expiration of the two-year statute of limitations for a legal malpractice action. MCL § 600.5805(4).

The trial court granted defendants' motion for summary disposition, and denied as futile plaintiff's motion to amend the caption. The court treated plaintiff's motion as one to amend the complaint to add a party, and denied same on the ground that the relation-back doctrine does not generally apply to the addition of new parties. Hurt v Michael's Food Center, Inc., 220 Mich App 169, 179; 559 NW2d 660 (1996).

We review a trial court's decision on a motion for summary disposition *de novo*. Harrison v Olde Financial Corporation, 225 Mich App 601, 605; 572 NW2d 679 (1997).

We review a trial court's decision on a motion to amend a complaint for an abuse of discretion. Weymers v Khera, 454 Mich 639, 654; 563 NW2d 647 (1997).

Plaintiff argues that the trial court erred by granting defendants' motion for summary disposition and abused its discretion by denying his motion to amend. We disagree and affirm. An action must be prosecuted in the name of the real party in interest. MCR 2.201(B). A real party in interest is one who is vested with the right of action on a given claim, even though the beneficial interest may rest with another. Hofmann v Auto Club Insurance Association, 211 Mich App 55, 95; 535 NW2d 529 (1995). Plaintiff's bankruptcy filing listed a possible cause of action for legal malpractice among his assets. This claim became part of plaintiff's bankruptcy estate. 11 USC 541(a)(1). Upon appointment, a bankruptcy trustee is vested with title to the debtor's entire estate, including rights of action. 11 USC 110(a). A bankruptcy trustee has the exclusive right to assert claims belonging to the debtor at the time of the bankruptcy filing. *In re* Newpower, 229 BR 691 (WD Mich, 1999); Bauer v Commerce Union Bank, 859 F2d 438, 441 (CA 6, 1988). Plaintiff's claim for legal malpractice became the property of the bankruptcy trustee, and could be pursued only by the trustee. McClarty v Gudenau, 176 BR 788 (ED Mich, 1995); Hofmann, *supra*. Summary disposition was properly granted.

The trial court's denial of plaintiff's motion to amend the caption of the complaint did not constitute an abuse of discretion. The bankruptcy trustee was the real party in interest prior to the filing of the complaint. The trial court correctly

> treated the motion as one seeking to add a party, and properly denied the motion. Hurt, *supra;* MCL § 600.5805(4). Plaintiff's reliance on Hayes-Albion Corporation v Whiting Corporation, 184 Mich App 410; 459 NW2d 47 (1990), as support for the assertion that the trial court should have allowed the amendment, is misplaced. Plaintiff has not established either that he had an interest in the subject matter at the time the malpractice complaint was filed, or that defendants had notice of the new plaintiff, *i.e.*, the bankruptcy trustee, prior to the expiration of the malpractice limitations period. *Id.*, 417. The trial court properly denied the motion to amend as futile. Hakari v Ski Brule, Inc., 230 Mich App 352, 355; 584 NW2d 345 (1998).
>
> Affirmed.

Huffman involved a situation where the plaintiff in the case moved to amend the caption after the statute of limitations expired to substitute or add the bankruptcy trustee as the plaintiff—which is, of course, *exactly the situation* in the case at bar. See, generally, Rheaume v Vandenberg, 232 Mich App 417, 423; 591 NW2d 331 (1998), where the Court of Appeals forum commented that "because plaintiffs' original notice of intent did not contain *any* name for [the party the plaintiff in Rheaume wished to add], this case is distinguishable from the 'misnomer' situation..." in Wells v Detroit News, Inc., 360 Mich 634; 104 NW2d 767 (1960).

In Wells, this forum allowed the correction of the name of a defendant corporation to relate back to the filing of the lawsuit. The Rheaume Court suggested that some leeway might have been granted the plaintiff had plaintiff merely misspelled the putative defendant's name.

There is nothing like that here. For one thing, Plaintiff doesn't want to *correct* the names or "misnomers" of the *Defendants*—Plaintiffs wants to *substitute* the Trustee in Bankruptcy *for himself.* That alone takes it completely out from under the ambit of Wells.

The fact remains—and it is, for all intents and purposes, now conceded by Plaintiff—that Plaintiff did not have standing to bring the instant lawsuit after March 6, 2001, when he filed his Voluntary Petition for bankruptcy. Since Plaintiff had no cause of action against the Defendants,

he has nothing to assign to the Trustee in Bankruptcy. The Trustee in Bankruptcy had Plaintiffs' claim against the Defendants, but, for whatever reason, opted not to sue the Defendants. Plaintiff cannot make an "end run" around both the Bankruptcy Code and the statute of limitations by filing a lawsuit without a legal right or basis to do so and then turning the lawsuit over to someone who could have brought his or her own suit before the statute of limitations ran[2] but failed to do so.

If Plaintiff's attorney erred in naming Plaintiff as Plaintiff in the case rather than the Trustee in Bankruptcy as Plaintiff, Plaintiff has an obvious remedy. Of course, since Plaintiff did not have any standing to bring this case after March 6, 2001, it is difficult to see on what basis Plaintiff *qua* Plaintiff could have instructed his attorney to file suit. The decision to file suit and the authorization to the attorney to file suit could only have come—or at least could only have legitimately come—from the Trustee in Bankruptcy. Plaintiff could, of course, have reminded the Trustee that the statute of limitations for the Trustee to bring suit was about to run so the Trustee could have filed suit, but apparently Plaintiff did no such thing.

There is a curious silence in Plaintiff's Application about the undisputed fact that Plaintiff was placed on notice of his standing problem before the statute of limitations ran and took no action until he was faced with a Motion for Summary Disposition several months later. If Plaintiff really meant to have the Bankruptcy Trustee file the instant lawsuit rather than himself personally, why did he not move to correct the caption as soon as it was called to his attention, and eliminate the statute of limitations problem? Plaintiff is silent on this point because, or so it may be presumed, he has no reasonable explanation for his lack of action.

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[2] As noted *supra*, the Defendants put Plaintiff on formal notice of his standing difficulty on December 16, 2003, 12 days *before* the statute of limitations for any personal injury lawsuit based on the December 28, 2000 accident ran.

What Plaintiff does not understand, probably intentionally, is that it is one thing when a name is misspelled or some such on a caption. Correcting that sort of misnomer is more a matter of housekeeping than anything else, and generally affects no one's substantive rights.

Here, however, Plaintiff sought to pursue a claim he had absolutely no legal right or standing to bring, something promptly pointed out to Plaintiff by the Defendants and promptly ignored by Plaintiff for several months. When push came to shove, so to speak, the Plaintiff sought to have the party that did have the legal right to sue the Defendants, the Bankruptcy Trustee, step forward. The only problem was that, by sitting on his hands and by letting, for whatever reason, the Bankruptcy Trustee sit on her hands, the legal right that had passed to the Bankruptcy Trustee upon Plaintiff's filing of bankruptcy had expired by operation of law (*i.e.*, the expiration of the applicable statute of limitations).

While the misnomer doctrine, so to speak, may in certain instances have application to plaintiffs as well as defendants, the fundamental assumption is that the party who originally filed the suit either had the power to bring suit or all concerned operated on the assumption that the party did have the power to bring suit. Nothing like that is present here. Again, Plaintiff's lack of standing to sue the Defendants was called to Plaintiff's attention by the Defendants while there was still time for Plaintiff to have the proper party—the Bankruptcy Trustee—file suit and Plaintiff opted to ignore the matter. It is not too much to ask Plaintiff to pay the price of his indifference, even if that means barring a cause of action Plaintiff might otherwise have had or that would otherwise have been available to the Bankruptcy Trustee.

Judge Mester correctly recognized the numerous fallacies in Plaintiff's misnomer argument, and correctly rejected them. The Court of Appeals correctly rejected Plaintiff's misnomer argument on appeal, and properly affirmed Judge Mester for reasons soundly based on

facts, law and logic. No useful purpose would be served by having this Supreme Court expend its scarce and extremely valuable judicial resources in review of decisions that are rock-solid in terms of their *ratio decidendi* and the facts on which that *ratio decidendi* was based.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, the Defendants respectfully request the Court of Appeals to issue an Order that denies Plaintiff's Application for Leave to Appeal the February 16, 2006 decision and opinion of the Court of Appeals in the above-entitled cause of action for the reason there is no merit in the grounds presented in Plaintiff's Application. The Defendants further respectfully request the award of such costs and attorney fees as to which they may be entitled under the court rules and statutes of the State of Michigan for having to defend themselves in the above-entitled cause of action.

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